LIBRARY
SUPREME COURT, U. S.

No. ~~1083~~ 54

MAR
JOHN F. D

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA,

Petitioner,

v.

R. B. RANDS, et ux.

Respondents.

On Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

SIDNEY TEISER
710 Morgan Building
Portland, Oregon 97205

Of Counsel: ALEX L. PARKS
710 Morgan Building
Portland, Oregon 97205

ROBERT ABRAMS
P. O. Box 428
Heppner, Oregon 97836

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-67

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Summary of Argument	3
Argument	4
Reasons for Not Granting the Writ	6
Conclusion	8

CITATIONS

CASES

Shively v. Bowlby, 152 U.S. 1	6
United States v. Chandler-Dunbar Co., 229 U.S. 53	6
United States v. River Rouge Improvement Co., 269 U.S. 411	5
United States v. Twin City Power Co., 350 U.S. 222	3, 4, 5, 6
United States v. Virginia Electric Power Co., 365 U.S. 624	3, 4, 5, 6

STATUTES AND RULE

Submerged Lands Act, 67 Stat. 29, 30, 32, 43, U.S.C. 1301, 1914	6

MISCELLANEOUS

99 Cong. Record 2750	7

In the Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA,

Petitioner,

v.

R. B. RANDS, et ux.

Respondents.

On Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent respectfully files this Brief in opposition to the petition for writ of certiorari filed by the United States of America.

OPINIONS BELOW

Respondent adopts the statement of the petitioner with respect to opinions below.

JURISDICTION

Respondent adopts the statement of the petitioner with respect to jurisdiction.

QUESTION PRESENTED

Whether value as a port-site, both historical and actual, should be included in arriving at just compensation for the taking of privately-owned riparian land when condemned by the United States for flood control, river improvement and hydroelectric development.

STATEMENT

The Statement by petitioner is substantially accurate except petitioner persists in designating the respondent's riparian lands as being a "*potential*" port-site. This is incorrect. The record clearly shows that respondent's riparian properties were historically utilized as a port-site and that at the time of the taking were primarily valuable as a port-site. The Court of Appeals correctly stated the factual situation in the opening paragraph of its opinion:

> "Appellants owned two tracts of land along the Columbia River, about six miles upstream from the present John Day Dam. On November 1, 1962, they leased this and other property to the State of Oregon, which wanted it for an industrial park. That industrial development, for maximum utility, required access to the Columbia River; because two railroads and the United States

owned most of the land along the river, appellants' property was especially valuable as a port site. The lease agreement gave Oregon an option to purchase the land. Most of the land was priced, under the option, at $150 per acre; the balance, denominated 'port site property' in the agreement, was priced at $400 per acre."

Except as noted above, respondent adopts the petitioner's Statement.

SUMMARY OF ARGUMENT

(1) *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624 are distinguishable from the case at bar and the opinion of the Court of Appeals for the Ninth Circuit clearly illustrates the distinguishable characteristics.

(2) Respondents' waterfront properties were and still are actual port-sites, not "potential" port-sites as petitioner has sought to characterize them.

(3) There is a major distinction between values attributable to the "flow of a stream" and values attributable to uplands by reason of access to navigable channels.

(4) No reasons exist for granting the requested writ.

(5) Rights of riparian access, translatable in terms of port-site value, have been held to be valuable — and compensable — property rights for hun-

dreds of years, both in England and in this country.

(6) The historical proprietary nature of riparian rights was reaffirmed in the Submerged Lands Act, 67 Stat. 29, 30, 32, 43, U.S.C. 1301, 1314.

(7) Petitioner's claim, if sustained, would cast doubt upon the values of hundreds of billions of dollars of riparian lands throughout the United States and stultify industrial development on lands bordering navigable waterways.

ARGUMENT

The position taken by the petitioner is clearly an attempt to use certain language in *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624 as support for a proposition for which those two cases do not stand and for which this court did not intend they should stand.

The Court of Appeals for the Ninth Circuit has very ably distinguished these two cases from the case at bar. (App. A, Petitioner's Petition for Writ of Certiorari, pp. 6a-11a) Nothing further need be said.

However, respondent calls attention to the patent attempt of the petitioner to label respondent's riparian properties as a "potential" port-site. This is an error. (See App. A, Petition for Writ of Certiorari, pp. 1a-2a)

Respondent also calls attention to the fact that there is a significant difference between a value at-

tributable to the "flow of a stream"—which was involved in *Twin City* and *Virginia Power* — and the value of riparian lands attributable to the presence of water. Indeed, respondent's riparian properties would be more valuable if it were not for the "flow of the stream" as the current impedes river traffic on the Columbia River.

The inequity of the petitioner's position was aptly characterized by the Court of Appeals for the Ninth Circuit in its comment concerning *United States* v. *River Rouge Improvement Co.*, 1926, 269 U.S. 411;

> "* * * This is a fundamental and inequitable inconsistency, designed to give the government the best of both worlds. But if it is fair to allow compensation to be reduced by resulting benefit to retained property; then fairness dictates that the additional value of property taken, attributable to the same source (here, riparian location), should be paid for." (App. A, Petition for Writ of Certiorari, pp 13a).

The respondent also notes with surprise the petitioner's statement concerning the Submerged Lands Act, contained in Footnote 7, page 9, Petition for Writ of Certiorari, "Furthermore, the Act concerned only submerged lands within the marginal sea." The act specifically relates to lands beneath navigable waters and includes inland waters as well as marginal seas, 43 U.S.C. 1301(a).

Reasons for Not Granting the Writ

(1) Sound judicial discretion does not require the granting of the writ. To the contrary, no grounds exist for granting it. Rule 19 relating to considerations governing review on certiorari enumerate the character of reasons which will be considered by the Court in granting writs. None of those reasons appear. There is no conflict on this question among the various circuits and no federal questions have been decided in any way in conflict with applicable decisions of this Court. To the contrary, the decision of the Court of Appeals for the Ninth Circuit is merely a reaffirmation of existing law exemplified by such cases as *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53.

(2) Since the inception of our systems of common law in England, riparian access has been recognized as a valuable property right. Lord Hale commented on the doctrine of riparian access in his treatise *De Jure Maris* and, as this Court pointed out in *Shively* v. *Bowlby*, 152 U.S. 1, the common law of England upon this subject at the time of the emigration of our ancestors is the law of this country. In an unbroken line of decisions since the beginning of our history, this Court has recognized the doctrine of riparian access and its compensability. This doctrine is not diluted by *Twin City* and *Virginia Power*.

(3) The Congress has reaffirmed the historical proprietary nature of riparian rights in the Submerged Lands Act, 67 Stat. 29, 30, 32, 43 U.S.C. 1301, 1314. The intent of Congress in passing the Act

to protect all property rights inhering in waterfront ownership on inland and coastal waters — with the sole exception of water power or the use of water for the production of power — shows through with startling clarity. As Senator Holland pointed out (99 Cong. Rec. 2750):

> "* * * Taking the nation as a whole, there are undoubtedly several billion dollars worth of port facilities alone, located on inland waters or on built-up lands which were once inland waters, so that it is easy to understand why the attorneys general, municipal officers, port authorities, and other similar officials, are deeply concerned in this fight and are insistent that the Congress shall effectually release to the States and their grantees all property right in the inland waters and their beds, saving only to the Federal government those rights which will enable it to perform its constitutional functions. * * *"

The petitioner has noted that within the Ninth Circuit the decision will affect the result in a number of pending cases and may also bear on the disposition of some $10,000,000 of pending claims. It would be more accurate to note that if the petitioner's claim is sustained, the effect upon the hundreds of billions of investment throughout the nation in port facilities alone would be catastrophic. No financier would be interested in lending monies to be utilized for the construction of wharves and docks on navigable streams if the entire investment could be taken without compensation.

The development of industry and wharf facilities

on riparian sites has risen to unprecedented levels in recent years. For example, in 1965 alone, a total of 512 new plants or plant expansions on navigable waters or adjacent to navigable waterways was announced. The value attributable to only 267 of these facilities amounted to $6,293,700,000. Included among these facilities were 109 terminals, docks and wharves.[1]

The incongruity of the petitioner's course of action in pressing this novel concept of non-compensability for riparian location, while at the same time spending billions of dollars to improve our navigable waterways and promote port development, is thus clearly demonstrated. Can anyone believe that the unprecedented development of industry and terminal facilities on our vast system of inland waterways will continue if the right of riparian access can be destroyed without compensation?

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

Of Counsel: SIDNEY TEISER
ALEX L. PARKS
ROBERT ABRAMS

---

[1] Waterside Site Plant Locations and Expansions, 1965, The American Waterways Operators, Inc., March, 1966.